# BACKGROUND BOOKS

## THE CONSTITUTION

"It is a novelty in the history of society to see a great people turn a calm and scrutinizing eye upon itself, when apprised by the legislature that the wheels of its government are stopped; to see it carefully examine the extent of the evil, and patiently wait for two whole years until a remedy was discovered... without having wrung a tear or a drop of blood from mankind."

As Alexis de Tocqueville marveled in his classic 1835 appraisal of **Democracy in America** (Arden, 1986), there was nothing in the history of nations like the American experiment.

The ancient Greek city-states and Imperial Rome had boasted "constitutions," as did Britain. Yet, as scholar-diplomat James Bryce observed in **Constitutions** (Oxford, 1901), these were not "Fundamental Laws, defining and distributing the powers of government," but a few ordinary statutes and "a mass of precedents, carried in men's memories or recorded in writing." In short, they were vague and mutable, *of* government, not above it.

Modern constitutional history begins with England's Magna Carta, the charter of rights that the unpopular King John ("Softsword," to his detractors) was forced to grant to his rebellious barons at Runnymede, a field by the Thames, on June 15, 1215. The charter became the basis of the British Constitution, which was considerably modified in practice and by acts of Parliament (e.g., the Habeas Corpus Act of 1679).

And, as A. E. Dick Howard writes, **The Road from Runnymede** (Univ. Press of Va., 1968) also led to Britain's Colonies in the New World.

Beginning with the Virginia Charter of 1606, which guaranteed the colonists all of the "liberties, franchises, and immunities" enjoyed by Englishmen, and extending through Colonial charters and covenants, and, eventually, state constitutions, Anglo-Saxon legal concepts shaped American political thought. "No taxation without representation!" is a cry straight from Magna Carta.

In 1776, however, Thomas Jefferson's Declaration of Independence appealed to a higher authority: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

For two centuries, American jurists have wrestled with the place of the Declaration (and natural rights) in the U.S. constitutional system. In the infamous *Dred Scott* case (1857), for example, Chief Justice Roger Taney was forced, in effect, to read the nation's slaves out of the Declaration of Independence in order to declare that they were not entitled to the protections of the Constitution.

Academics entered the fray in 1913, when historian Charles A. Beard published **An Economic Interpretation of the Constitution of the United States** (Free Press, 1986).

Beard argued that the Framers and their allies were a wealthy elite of merchants, manufacturers, and investors who staged an antidemocratic counterrevolution to protect their personal economic interests. The Constitution, Beard wrote, "was essentially an economic document based upon the concept that the fundamental private rights of property are... morally beyond the reach of popular majorities."

Scholars debated Beard's assertions for decades. **We the People** (Univ. of Chicago, 1976) by the University of Alabama's Forrest McDonald convincingly refutes most of Beard's findings. "It is abundantly evident," McDonald adds, "that the delegates, once inside the Convention, behaved as anything but a con-

## INTERPRETING THE CONSTITUTION

For more than a century after the Founding, legal scholars seldom disagreed about how to interpret the Constitution. Court decisions were to be based on logical deductions from legal precedents and the opinions of the Framers.

But early in the 20th century, disenchantment with rulings by an activist conservative Supreme Court spawned the Legal Realism movement. The slogan "Law is merely a matter of what the judge ate for breakfast" reflected the Realists' view that a judge's political beliefs shape his legal decisions.

Far from rejecting judicial activism, the Realists concluded, as Felix Frankfurter put it in 1915, that the law should be "a vital agency for human betterment." In **The Rise of Modern Judicial Review** (Basic, 1986), Christopher Wolfe describes how the Supreme Court's acceptance of Legal Realism figured in such important cases as *Brown* v. *Board of Education* (1954). The Court went beyond legal precedent and the original intent of the authors of the Fourteenth Amendment in declaring "separate but equal" public schools unconstitutional. Citing evidence produced by social scientists, the Court ruled that segregated schools created "a feeling of inferiority" among blacks.

Today, constitutional interpretation is far more contentious.

On the radical Left is the Critical Legal Studies movement. Harvard's Roberto Mangabeira Unger, for example, dismisses the idea of the rule of law as a deception perpetrated by the nation's ruling elite. Advocates of a transformation of the social and legal order, the "critters" favor acts of "creative negativity." The closest thing to a manifesto is Unger's **Critical Legal Studies Movement** (Harvard, 1986).

Many liberals still embrace Legal Realism. In **Taking Rights Seriously** (Harvard, 1977), Ronald Dworkin adds that the Supreme Court must sometimes turn to moral laws beyond the Constitution in pursuit of social goals.

Surprisingly, some of the sharpest debates occur on the conservative side of the political spectrum. The most familiar conservative idea is the Original Intent doctrine, voiced by U.S. appeals court judge Robert H. Bork in **Tradition and Morality in Constitutional Law** (American Enterprise Institute, 1984). "The intentions of the Founding Fathers," Bork maintains, "are the sole legitimate premise from which constitutional analysis may proceed."

But, harking back to the 19th-century Supreme Court, Richard A. Epstein of the University of Chicago argues in **Takings** (Harvard, 1985) that the Constitution enshrines broad "natural rights" and, in effect, laissez-faire economics. Richard A. Posner, a U.S. appeals court judge, takes a more utilitarian view. He argues for an **Economic Analysis of Law** (Little, Brown, 1973) where the Constitution is unclear. Thus, he supports the Court's 1954 decision in *Brown*, but on the grounds that segregated schools retard the prosperity of blacks, and thus of society as a whole.

Ironically, Epstein writes, as jurists and scholars of all persuasions increasingly depart from the letter of the Constitution, the old "dichotomy between left and right, conservative and liberal, is... breaking down."

solidated economic group."

Yet Beard's argument remains influential, not least because the Framers themselves made no bones about their fears of democracy. As Virginia's Edmund Randolph told the Philadelphia Convention, "our chief danger arises from the democratic parts of our [state] constitutions."

In **The New Nation: A History of the United States during the Confederation, 1781–1789** (Northeastern, 1981), Merrill Jensen contends that the Framers vastly exaggerated the nation's ills in order to win popular support for the Constitution. For example, in 1785, only two years before he helped write the new Constitution, Benjamin Franklin declared that the ex-Colonies' troubles "exist only in the wishes of our enemies. America never was in higher prosperity." George Washington shared Franklin's optimism, Jensen argues—at least until his overreaction to Shays's Rebellion in the summer of 1786 "frightened him out of retirement."

Of all the Framers, writes Catherine Drinker Bowen in **Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787** (Little, Brown, 2nd ed., 1986), Washington felt the shortcomings of the Confederation most deeply. During the Revolution, he had fumed over the inability of the Continental Congress to provision his troops with even the barest necessities—food, clothes, shoes, medicine, and gunpowder.

But in 1787 Washington was curiously reticent. It was unclear if he would attend the Convention. "He had little wish," Bowen says, "to risk his reputation in a movement that might fail."

Physically imposing, dignified, yet known for his strong "passions," Washington dominated the proceedings at Philadelphia while hardly saying a word. The delegates watched him closely for a look or gesture that would betray his feelings on an issue—usually in vain.

Bowen's account of the Convention is by far the liveliest of the many that have been written. But the original **Records of the Federal Convention of 1787**, 4 vols. (Yale, 1986), edited by Max Farrand, provide a good sense of the drama and grandeur in Philadelphia.

"*Experience* must be our only guide," declared Delaware's John Dickinson. "*Reason* may mislead us." In fact, his colleagues seldom referred directly to the governmental theories of the great French and English thinkers of the era—Montesquieu, Locke, Hobbes. The delegates' arguments were incisive and elegant, as they moved from the great lessons of ancient Greece's Amphictyonic Council to the rough-and-tumble realities of politics in the 13 states.

Even the smallest points of the new Constitution were fully debated. The Framers' eloquence would shame any modern legislator; the logic of their conclusions seems to reduce the theories of latter-day historians to mere cavils.

**The Federalist** (Arden, 1986) has long been acknowledged as the basic defense of the new Constitution. Cornell's Clinton Rossiter called this work by James Madison, Alexander Hamilton, and John Jay "the one product of the American mind that is rightly counted among the classics of political theory."

**The Anti-Federalist** (Univ. of Chicago, 1985), edited by Herbert J. Storing, is a recent compilation of writings by foes of the Constitution. In a companion volume, **What the Anti-Federalists Were For** (Univ. of Chicago, 1981), Storing says that it is no mystery why Patrick Henry and his allies were defeated by the Federalists: "They had the weaker argument."

The Antifederalists envisioned an America composed of small republics populated largely by yeoman farmers, free of "extremes of wealth, influence, education, or anything else."

Advocates of minimal government, the Antifederalists stressed the importance of the citizenry's self-regulating "civic virtue." They feared that every feature of the new Constitution would disrupt the nation's religion and morals. The creation of a national capital city ("ten Miles square," as the Constitution put it) would breed "courtly habits"; the expansion of commerce would encourage "vanities, levities, and fopperies."

Their fears may have been exaggerated, Storing says, but the Antifederalists were far-sighted in their worries over the problem of preserving civic virtue in a large, heterogeneous republic. Their foresight, he contends, and the fact that they forced the addition of a Bill of Rights to the Constitution, entitles them to be counted among the Founding Fathers of the United States.

Almost as soon as it was ratified, the Constitution was tested by conflict and change. During the Whiskey Rebellion of 1794, Pennsylvania farmers took up arms against the new U.S. tax on liquor. President Washington summoned the militias of nearby states, then held his breath to see if they would respond. They did; the insurrection was crushed.

In **The Bill of Rights: Its Origin and Meaning** (Bobbs-Merrill, 1965), Irving Brant recalls that Representative James Madison's efforts to introduce the Constitution's first amendments in Congress in 1789 met with indifference and outright hostility. Must the Constitution, asked Theodore Sedgwick, Madison's Massachusetts colleague, also specify "that a man should have a right to wear his hat if he pleased?"

Edward S. Corwin's **The Constitution and What It Means Today** (Princeton, 14th rev. ed., 1979), updated by occasional supplements, is a spirited article-by-article guide to the Constitution and its evolution through amendment, judicial interpretation, and legislation. Many political developments, e.g., the emergence of parties, had no specific constitutional sanction.

Yet, as historian Michael Kammen suggests in **A Machine that Would Go of Itself: The Constitution in American Culture** (Knopf, 1986), in the United States, more than in most nations, political conflict revolves around the Constitution. At the outbreak of the Civil War in 1861, President Abraham Lincoln and the South's leaders both claimed to be the true upholders of the U.S. Constitution. (The Confederate Constitution of 1861 resembled the Framers' creation, with a few exceptions. Among them: a guarantee of the right to own slaves, and a single, six-year presidential term.)

The observances of this year's bicentennial of the Framing will include much celebration of the Constitution's flexibility. But, as political scientist Walter Berns writes in **Taking the Constitution Seriously** (Simon & Schuster, forthcoming), it is the enduring achievement of the 55 men at Philadelphia, not the frequently erratic path of constitutional law, that deserves the honor and awe of their 20th-century countrymen.

EDITOR'S NOTE: *Some of the titles in this essay were suggested by Art Kaufman, former assistant director of Constitutional Studies at the American Enterprise Institute and coeditor of* Separation of Powers: Does It Still Work? *(1986). For related titles, see* WQ *Background Books essays on The American Revolution (Autumn '76) and The Supreme Court (Spring '77).*